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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

SECURITY GAS & OIL INC., a California Corporation,
RAYMOND G. MILLER, EMANUEL RAPOPORT and
JAMES BEHRENS,
Petitioners,

vs.

JOSEPH KRAMAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Two questions are presented:

1. Whether the Court of Appeals erred in ruling that the Respondent's objection to the District Court's charge to the jury complied with the requirements of Fed. R. of Civil Procedure 51.

2. Whether the District Court properly instructed the jury on the elements of materiality and reliance under Rule 10b-5 issued pursuant to Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b).

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Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed March 26, 1982.

OPINION BELOW

The Opinion of the Court of Appeals was unreported, and is set forth verbatim in Appendix "A" to this petition.

JURISDICTION

The Judgment of the Court of Appeals was filed on March 26, 1982. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

15 U.S.C. § 78j(b):

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

15 U.S.C. § 77q(a):

"(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make state statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Rule 10b-5 of the General Rules and Regulations of the Securities and Exchange Commission:

"Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

STATEMENT OF THE CASE

This controversy arose out of purchases of limited partnership interests in oil and gas drilling projects by Respondent Joseph Kramas (hereafter "Kramas") from the Petitioners (hereafter referred to as "SEGO"). The complaint was filed on February 3, 1977, and was later amended. The amended complaint contained claims under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) and Rule 10b-5 of the General Rules and Regulations under the Securities Exchange Act; Sections 12(2) and 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a); Section 25500 of the California Corporate Securities Law; and the Common Law of the State of California for breach of fiduciary duty.

At trial the jury found for Kramas on the state law claim, but for SEGO and the individual defendants on all Federal claims.

Thereafter, Kramas appealed to the United States Court of Appeals for the Ninth Circuit, which reversed the District Court's judgment as to Kramas's Rule 10b-5 and Section 17(a) claims on the ground that the District Court erroneously charged the jury on the elements of materiality. All other issues were resolved in SEGO's favor.

In reversing the District Court's judgment, the Court of Appeals held that Kramas's objection to the jury instructions on the issues of materiality and reliance satisfied the requirements of Fed. R. Civil Procedure 51. Further, the Court ruled that the charge given by the Judge on the elements of materiality and reliance were in error. It is here urged that these rulings merit review by the United States Supreme Court.

REASONS WHY THE WRIT SHOULD BE GRANTED

1. The ruling of the Court of Appeals, and similar rulings in other Circuits, seriously undermine the spirit and intent of Fed. R. of Civil Procedure 51

The Rule provides in part:

> ". . . No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. . . ."

The Court of Appeals set forth the circumstances in which this issue arose as follows:

"The trial judge began by instructing that a material fact is 'one that a reasonable person in the circumstances of the Plaintiff would attach importance to in determining his choice of action in this kind of transaction.' This means, explained the court, 'one that a reasonable person and in the plaintiff's position would deem important in deciding whether or not to purchase a limited partnership interest in an oil and gas drilling project.' R.T. 702. Kramas does not appear to contest the correctness of this formulation; indeed, the authorities he cites state the rule in the same way. *See, e.g., Marx v. Computer Sciences Corp.*, 507 F.2d 485, 489 (9th Cir. 1974).

However, the trial judge then elaborated:

> "A fact omitted to be stated is the kind of thing that a reasonable person would have changed his mind about had he known the true fact.
>
> "In the case of the matter stated, is it the sort of thing that, if stated correctly, would have dissuaded the investor from making the investment[?] R. T. 703

"At the conclusion of the court's instructions, counsel for Kramas made the following objection:

"COUNSEL: Your Honor, I would only object to the language stated by the Court concerning the reliance being that it would have dissuaded the plaintiff from investing. I didn't believe that to be the law.

"I think, as I understand the law, to be sufficient so that he would have considered it; but that the law does not say, requirement of dissuading him from investing.

"THE COURT: I think I put it in the alternative, didn't I?

"COUNSEL: I didn't understand it that way."

The appellate court ruled that although the objection was somewhat ambiguous, it was sufficient to alert the Court to error and thus satisfied Fed. R. of Civil Procedure 51, citing *Brown v. Avemco Inv. Corp.*, 603 F.2d 1367, 1372-74 (9th Cir. 1979). The Court interpreted Kramas' objection related not only to the Court's elaboration concerning the elements of materiality in matters misrepresented, but also to the Court's explanation of materiality in the case of omissions. This scenario points up the difficulty faced by trial judges when objections of this kind are not clearly presented. It is obvious that the trial judge believed the objection related only to the instruction concerning materiality in the case of misrepresentations and did not believe counsel was objecting to the instruction concerning omissions. As the matter was put to the District Judge, his conclusion was entirely reasonable. A trial court is usually at a disadvantage in not having time for contemplative reflection which is a luxury enjoyed by appellate judges. The net effect here is that Kramas now has had the opportunity to allow the case to go to the jury on an allegedly erroneous instruction, thus, hopefully, assuring himself of a second chance if he didn't like the outcome.

The Ninth Circuit, as well as other circuits, have radically departed from the spirit and intent of Rule 51. *Brown v. Avemco Inv. Corp.*, supra, is but an example of the trend in many circuits to adopt a so-called "plain error" exception to Rule 51. In effect, the Court has said that it may reverse for plain error when necessary to prevent

a miscarriage of justice despite a failure to comply with Rule 51.

Rule 51 was clearly designed to require a party to state objections to an instruction with sufficient clarity so that the trial judge may understand what they are and follow them if well taken. The Rule should prevent a party from stating one ground of objection and then relying on a different ground for the objection on appeal. See *Appleyard v. Transamerican Press, Inc.*, 539 F.2d 1026, 1031 (4th Cir. 1976), *cert. den.*, 429 U.S. 1041 (1977).

However, the Ninth Circuit, and other circuit courts, have vastly departed from the strictures of Rule 51 in allowing objections which are not stated distinctly and are not sufficiently specific to satisfy the Rule.

This Court interpreted the Rule as it should be applied in *Palmer v. Hoffman*, 318 U.S. 108, 119, 63 Sup. Ct. 477, 483, 87 Law Ed. 645 (1943):

> " . . . In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained a correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general objection obtain a new trial. . . . That long standing rule of federal practice is applicable in this type of case as in others. That rule cannot be avoided here by reason of the requested charge. . . ."

The decision below, consequently, is in direct conflict with Rule 51 as well as the interpretation of that Rule set forth by this Court in *Palmer v. Hoffman, supra.*

2. The Court of Appeals incorrectly ruled that the trial judge's instructions to the jury on the elements of an action under Rule 10b-5 were erroneous

The instructions in question have already been quoted above. Since the instructions as to omissions were not properly objected to, as argued above, those instructions will not be addressed here. The cases cited by the Court of Appeals, *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, and *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972), both treated cases involving nondisclosure of omitted facts and are inapplicable to overt misrepresentations.

The District Court's instruction that reliance must be such that an investor would have been dissuaded from making an investment in the case of misrepresentations was entirely in keeping with case law. The Ninth Circuit itself has adhered in 10b-5 cases to the traditional and less speculative common law of the objective test of materiality. In *Marx v. Computer Sciences Corp.*, 507 F.2d 485, 489, footnote 6, (9th Cir. 1974), the Ninth Circuit embraced the tenents of *List v. Fashion Park, Inc.*, 340 F.2d 457, 462 (2nd Cir. 1965), wherein the court said:

> "The basic test of 'materiality' on the other hand is whether 'a reasonable man would attach importance (to the fact misrepresented) in determining his choice of action in the transaction in question.' Restatement, Torts, § 538(2)(a); accord Prosser, Torts, §§ 554-55; 1 Harper & James, Torts, §§ 565-66. Thus to the requirement that the individual plaintiff must have *acted* upon the facts misrepresented, is added to the parallel requirement that a reasonable man would

> also have *acted* upon the fact misrepresented." [Underlining supplied].

The *List v. Fashion Park, Inc., supra*, approach to materiality is still viewed with favor in the Ninth Circuit, as well as other circuits. See *Marx v. Computer Sciences Corp., supra*. In the Second Circuit in which *List v. Fashion Park, Inc., supra*, arose, the court, in *Dopp v. Franklin National Bank*, 461 F.2d 873, 880 (2nd Cir. 1972), treated the materiality of misrepresentations as follows:

> " . . . To succeed in a 10b-5 action, the plaintiff must prove that he relied upon a misrepresentation of a material fact to his detriment. See e.g., List v. Fashion Park, Inc., 340 F.2d 457 (2nd Cir.) cert. den., 382 U.S. 811, 86 Sup. Ct. 23, 15 Law Ed. 2d 60 (1965). Thus, Dopp will have to establish that but for the misrepresentation, *he would have acted differently—in this case that he would have redeemed the shares himself or found a third party to purchase them if he had been given the opportunity.* We know, however, that as late as July Dopp had not done either." [Italics supplied.]

Clearly, the circuit courts, in the event of misrepresentations, adhere to a requirement that materiality be founded upon the concept that the investor would have acted differently had he known the true facts.

Similar reasoning was followed in *Manor Drug Stores v. Blue Chip Stamps*, 492 F.2d 136, 142 (9th Cir. 1973), (reversed on other grounds, 421 U.S. 723 (1975)), where the Ninth Circuit declared:

> "As to causation, the complaint alleges that the consent decree offer was intended to be and was a bar-

> gain; that units of securities having a market value of $315 were offered to plaintiff. Thus appellant for $101—a difference so great as to provide prima facie an *objective basis for a factual inference that users properly informed, rather than misled, would have accepted the offer. . . .*" [Underlining supplied.]

And in *Voŋs v. Dickson*, 495 F.2d 607, 622 (5th Cir. 1974), the court flatly asserted:

> "A material fact is one which would cause a reasonable investor to have acted differently in respect to a securities transaction. *Securities and Exchange Commission v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2nd Cir. 1968)."

Clearly, then, it is the law among the various circuits, including the Ninth Circuit, that in order for a misrepresentation to be deemed material, it must be established that the investor would have acted differently had the facts been truthfully stated. In the context of the instant case, this is merely another way of saying that a material fact (to paraphrase the trial court's instruction) is, "in the case of the matter stated, the sort of thing that, if correctly stated, would have dissuaded the investor from making the investment". Again, it is another way of saying that reliance on the part of the investor is a requirement under Rule 10b-5 in the case of misrepresentations.

The decision below, therefore, is directly contrary to its own authority and authority in other circuits. This Court is urged to correct this incongruity.

CONCLUSION

The writ should be granted as asked.

Respectfully submitted,

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(Appendix A follows)